Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

WILLIAM G. GRADY, ADMINISTRATOR,
SHIRLEY JAKABOSKI, INTERVENOR,

Petitioners,

vs.

TOWN AND CITY OF MIDDLETOWN,
JAMES PARKER, LOUIS TOSTO, and JOHN LATERRA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

JOHN R. WILLIAMS
Counsel of Record
51 Elm Street
New Haven, CT 06510
(203) 562-9931
Facsimile: (203) 776-9494
E-Mail: jrw@johnrwilliams.com
Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

CHR

QUESTION PRESENTED

MUST THE TRIAL COURT GRANT SUMMARY JUDGMENT, ON THE GROUND OF QUALIFIED IMMUNITY, IN FAVOR OF POLICE OFFICERS SUED FOR UNREASONABLE FORCE, AND THUS DENY PLAINTIFFS A JURY TRIAL, ANY TIME THE OFFICERS SUED ARE ABLE TO PRODUCE AN EXPERT WITNESS FAVORABLE TO THEM, WHETHER OR NOT THAT EXPERT IS CONTRADICTED BY AN EXPERT WITNESS FOR THE PLAINTIFFS?

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PETITION FOR A WRIT OF CERTIORARI

The petitioners, William G. Grady, Administrator, and Shirley Jakaboski, Intervenor, petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit was rendered on April 22, 2002, and was not published. It is printed as Appendix A to this petition. The opinion of the United States District Court for the District of Connecticut upon which the Court of Appeals based its ruling was rendered on March 29, 2001. It also was not published. It is printed as Appendix B to this petition.

JURISDICTION

The United States Court of Appeals for the Second Circuit rendered its decision on the petitioner's appeal on April 22, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "No state shall . . . deprive any person of . . . property without due process of law. . . . "

The Fourth Amendment to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

42 U.S.C. § 1983 provides, in pertinent part:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

This was an action for the unreasonable use of deadly force against a police officer who shot the son of petitioner Shirley Jakaboski in the back of the head during a struggle associated with his arrest on misdemeanor charges in his own home. Two other officers present at the shooting were sued for their failure to intervene in the struggle and the City of Middletown, Connecticut, which employed all the officers, was sued only for indemnification under state law. The action was brought originally in state court but was removed by the defendants to the United States District Court. Summary judgment was granted in favor of all defendants on the ground of qualified immunity and that ruling was affirmed on appeal.

The cause of Alex Jakaboski's death was never in dispute. He was shot in the back of the head at point-blank range by a police officer. It was the circumstances of that shooting that produced the opinions below.

Middletown police officers responded to a call by the decedent's mother at about 8:00 p.m. on the evening of November 27, 1994. She reported that she was having difficulties with her son, Alex, that he had struck her, knocked over a bureau and punched a hole in the wall of their apartment.

The first two officers on the scene were respondents Parker and Laterra. Sergeant Tosto arrived soon after. Parker and Laterra knocked on the door and observed a person peeking out from behind the window blinds in the unit. They could hear a radio or television playing inside. Eventually Alex Jakaboski opened the door but refused to grant permission to enter the home.

Shirley Jakaboski arrived as the officers were speaking to her son in the doorway. She invited the officers inside so they could investigate her complaint. She told the officers that she had been having problems disciplining her son and that they had argued about his homework and his use of alcohol. She stated further that her son had knocked over a bookcase, kicked a hole in the bedroom wall and struck her several times. The officers observed damage to the apartment consistent with her complaint.

The officers decided to arrest Alex for misdemeanor violations of Connecticut's family violence statutes. Officer Parker told Alex he was about to be arrested and ordered him to put down a soda can he was holding and turn around to be handcuffed. As Parker took out his handcuffs, Alex extended his arms rigidly in front of him, stiffened

and attempted to turn away. During the ensuing struggle, Parker sprayed an irritant called Capstun at Alex, to no apparent effect, and the struggle continued. The officers then used take-down procedures to throw the arrestee to the floor. He initially lay face down on the floor with his hands beneath his body. Although the officers ordered him to remove his arms from beneath his body, he refused and the struggle continued.

Officer Parker then managed to pry loose Alex's left arm and Officer Laterra was able to place a handcuff on his left wrist. While attempting to turn him over, Sergeant Tosto observed for the first time that Alex was holding a handgun. The officers immediately rolled him back onto his stomach, thus placing a barrier between themselves and the gun. They ordered him to release the gun but were unable to observe whether he had complied. A gun fired twice and the officers assumed it was the gun beneath Alex's body. One of the bullets passed through Alex's thigh and lodged in a nearby wall. Alex then attempted to rise and as he did so, Officer Parker fired two rounds, point-blank and execution style, into the back of his head, killing him instantly. When Alex's body was rolled over, he was found to have a .45 caliber pistol in his right hand. Investigators later determined that the gun belonged to his mother.

Larry F. Jetmore, Ph.D., a retired Captain in the Hartford Police Department, reviewed the case and submitted a written opinion that the killing of Alex Jakaboski "does not meet the test of what a reasonable police officer would do under the same or similar circumstances." Noting that the deceased's head "was very near to, if not in contact with the floor when at least one of the projectiles

impacted the back of his head," Captain Jetmore concluded: "Testimony of the officers indicates that when Alexander Jakaboski was shot, Sergeant Tosto was holding onto his right hand/wrist and Officer Laterra was holding onto the cuff on Alexander Jakaboski's left hand. Neither Sergeant Tosto nor Officer Laterra had his weapon drawn. Sergeant Tosto and Officer Laterra were still using compliance and control tactics to mitigate the threat posed by Alexander Jakaboski when Officer Parker fired two shots into the rear of Alexander Jakaboski's head. Officer Parker's decision to fire a shot to kill (back of the head as opposed to center mass) does not meet the test of what a reasonable police officer would do under the same or similar circumstances. . . . "

Moving for summary judgment on qualified immunity grounds, the defendants countered the Jetmore affidavit with a report by an Assistant State's Attorney and a written review by the State Police Forensic Science Laboratory, both of which concluded that Officer Parker had not used unreasonable force in the shooting.

Affirming the grant of summary judgment to all defendants, the Court of Appeals assumed, *arguendo*, "that the officers used force that was sufficiently unreasonable under the Fourth Amendment to constitute excessive force," but held that the very fact that the defendants had produced experts in support of the alleged reasonableness of their actions, despite the contrary view of the plaintiffs' expert, "lends credence to the conclusion that reasonable officers could differ in their opinion of the propriety of the force employed. . . . Because the evidence establishes that 'officers of reasonable competence could disagree on the legality of the defendant's actions,' the objective

reasonableness test is met, and the defendants are entitled to qualified immunity." *Citing Malley v. Briggs*, 475 U.S. 335, 341 (1986).

REASONS FOR GRANTING THE WRIT

THE PLAINTIFF IN A SUIT FOR WRONGFUL USE OF DEADLY FORCE UNDER 42 U.S.C. § 1983, WHOSE CLAIM IS SUPPORTED BY SUFFICIENT FACTUAL AND EXPERT EVIDENCE, CANNOT BE DENIED HER RIGHT TO A JURY TRIAL MERELY BECAUSE THE DEFENDANT POLICE OFFICER IS ABLE TO PRODUCE CONTRARY EVIDENCE FROM ANOTHER EXPERT WITNESS

The affirmative defense of qualified immunity affords immunity to "government officials performing discretionary functions" only "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. . . . " *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982). A police officer enjoys such immunity only if a reasonable police officer, under the circumstances as they existed, could have believed that his actions were lawful. *Anderson v. Creighton*, 483 U.S. 635 (1987).

The qualified immunity defense does no more than limit liability to those cases where "the contours of the right are sufficiently clear that a reasonable official would understand that what he is doing violates that right. . . . So conceived, the object of the 'clearly established' immunity standard is not different from that of 'fair warning' as it relates to law 'made specific' for the purpose of validly applying [the criminal counterpart to Section 1983]. . . . [B]oth serve the same objective, and in effect the qualified

immunity test is simply the adaptation of the fair warning standard to give officials (and, ultimately, governments) the same protection from civil liability and its consequences that individuals have traditionally possessed in the face of vague criminal statutes. To require something clearer than 'clearly established' would, then, call for something beyond 'fair warning.'" *United States v. Lanier*, 520 U.S. 259, 117 S. Ct. 1219, 1227 (1997).

The burden of pleading and proving the affirmative defense of qualified immunity rests upon the defendant claiming its benefit. *Gomez v. Toledo*, 446 U.S. 635, 640 (1980); *Harlow v. Fitzgerald*, *supra*, at 815.

The issue presented by this case is whether, when there exists a genuine factual dispute concerning the qualified immunity defense in a Section 1983 case, the trial judge may nevertheless use the very existence of that factual dispute to deprive a plaintiff of her Seventh Amendment right to a jury trial. As was said very recently in the context of the Sixth Amendment right to a jury trial in criminal cases, "our people's traditional belief in the right of trial by jury is in perilous decline." *Ring v. Arizona*, ___ U.S. ___, 70 U.S.L.W. 4666, 4674 (2002) (Scalia, J., concurring). The ruling of the Second Circuit in this case contributes to that decline in the context of civil litigation of a kind only slightly less important than a criminal trial.

Harlow immunity is not, strictly speaking, a jury question although juries often are called upon to resolve factual disputes which are necessary predicates to deciding the qualified immunity defense. *Hall v. Ochs*, 817 F.2d 920 (1st Cir. 1987); *Lennon v. Miller*, 66 F.3d 416, 421 (2d Cir. 1995); *Warren v. Dwyer*, 906 F.2d 70 (2d Cir. 1990); *Finnegan v. Fountain*, 915 F.2d 817, 821 (2d Cir. 1990);

Holt v. Artis, 843 F.2d 242, 245-46 (6th Cir. 1988); *Dominque v. Telb*, 831 F.2d 673 (6th Cir. 1987); *Alvardo v. Picur*, 859 F.2d 448, 451 (7th Cir. 1988); *Llanguno v. Minguey*, 763 F.2d 1560 (7th Cir. 1985) (*en banc*); *Gainor v. Rogers*, 973 F.2d 1379 (8th Cir. 1992); *Adams v. St. Lucie County Sheriff's Dept.*, 962 F.2d 1563, 1567 (11th Cir. 1992); *Ansley v. Heinrich*, 925 F.2d 1399 (11th Cir. 1991).

The fact question whether a belief or state of mind, asserted by an officer as his affirmative qualified immunity defense, was indeed objectively reasonable, always has been considered a jury question. It is not only proper, but is mandatory, to submit the issue of objective reasonableness to the jury when it is properly pled and there is defense evidence to support it. *Oliveira v. Mayer*, 23 F.3d 642 (2d Cir. 1994); *Snyder v. Trepagnier*, 142 F.3d 791 (5th Cir. 1998); *Presley v. City of Benbrook*, 4 F.3d 405 (5th Cir. 1993). See *Jensen v. City of Oxnard*, 143 F.3d 1078, 1086 (9th Cir. 1998) (whether it was reasonable for a police officer to shoot a fellow officer, working undercover, in the course of a SWAT raid was fact-dependent and could not be decided on summary judgment).

The qualified immunity defense to an unreasonable force claim is especially likely to require a jury determination of disputed facts. As the Second Circuit pointed out in *Posr v. Doherty*, 944 F.2d 91 (2d Cir. 1991), the qualified immunity defense to a claim of excessive force ordinarily will be limited to the question of whether "it was objectively reasonable for [the officer] to believe at the time of the challenged action that his actions were lawful." 944 F.2d at 95. That determination is almost always dependent on factual determinations and therefore will rarely if ever be one which can be resolved on a motion for summary judgment. See also *Spann v. Rainey*, 987 F.2d 1110 (5th

Cir. 1993); *Sheth v. Williams*, 137 F.3d 1447 (11th Cir. 1998).

While a jury cannot decide the legal component of the qualified immunity defense, the jury should be and ordinarily is given fact interrogatories the answers to which then decide the qualified immunity defense. *E.g.*, *Pouillon v. City of Owosso*, 206 F.3d 711, 718 (6th Cir. 2000) (Boggs, J.). On the other hand, in a simple case where the only qualified immunity question is whether a reasonable officer could have believed that the conduct in question was prohibited, it may be permissible to package it all together into a general verdict without interrogatories. *Sikes v. Gaytan*, 218 F.3d 491 (5th Cir. 2000).

In this case, however, in the face of long precedent and a common sense application of the right to a jury trial in civil cases, the Second Circuit has held in effect that any time a defendant can produce a witness to support his position on a qualified immunity question, the mere existence of the witness deprives the plaintiff of her right to have that witness's credibility and reliability assessed by a jury. That ruling represents a stunning change in the law and requires the review of this court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

William G. Grady and
Shirley Jakaboski, Petitioners

JOHN R. WILLIAMS
51 Elm Street
New Haven, CT 06510
(203) 562-9931
Facsimile: (203) 776-9494
E-Mail: jrw@johnrwilliams.com

Their Attorney

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

(Filed Apr. 22, 2002)

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 22nd day of April two thousand and two.

Present: RALPH K. WINTER,
JOSEPH M. McLAUGHLIN,
ROSEMARY S. POOLER,
Circuit Judges.

WILLIAM G. GRADY, ADMINISTRATOR, SHIRLEY JAKABOSKI, INTERVENOR,

Plaintiffs-Appellants,

-v-

TOWN and CITY OF MIDDLETOWN, JAMES PARKER, LOUIS TOSTO, and JOHN LATERRA,

Defendants-Appellees.

(Docket No. 01-7466)

Appearing for Appellants:

Norman A. Pattis, New Haven, CT

Appearing for Appellee:

Elliot B. Spector, West Hartford, CT

Appeal from the United States District Court for the District of Connecticut (Robert N. Chatigny, *Judge*).

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of said District Court be and it hereby is **AFFIRMED**.

Plaintiffs-Appellants William G. Grady, administrator of the estate of Alex Jakaboski, and Shirley Jakaboski, intervenor and mother of Alex Jakaboski, appeal from the March 29, 2001 Ruling and Order of the United States District Court for the District of Connecticut (Robert N. Chatigny, *Judge*), granting defendants-appellees' motion for summary judgment, pursuant to Federal Rule of Civil Procedure 56(c).

The district court found that the undisputed evidence established the following facts: that on November 27, 1994, Shirley Jakaboski called the Middletown Police Department from a friend's house and requested assistance. She reported to the dispatcher that her son, Alex Jakaboski, hit her, knocked over a bureau, and kicked a hole in the wall. She stated that she wanted the police to talk with her son, tell him not to hit his mother, and tell him he had to receive counseling. In answer to questions about the presence of weapons in the house, Mrs. Jakaboski stated that Alex had a BB gun and a hunting bow and that she had a rifle of which

he was not aware. She specifically denied the existence of a handgun.

Eventually, the police, Mrs. Jakaboski, her friend, and the three defendant police officers all arrived at Mrs. Jakaboski's apartment and found Alex Jakaboski inside. After confirming Mrs. Jakaboski's version of events, the police officers decided to arrest Alex for violating various provisions of Connecticut's family violence laws. It is undisputed that Alex actively resisted arrest, refused to allow the officers to handcuff him, fought their attempts to restrain him, and struggled with them. During the course of the struggle, the police pinned Alex on the ground. It is also undisputed that, after rolling Alex onto his side, Officer Tosto, shouted, "46," and then, "gun," in response to seeing Alex holding a handgun. After that, two shots were fired from Alex's gun, and Officer Parker then fired two fatal shots into the back of Alex's head.

Plaintiff's filed this action, pursuant to 42 U.S.C. § 1983, alleging that defendants used excessive force, in violation of the Fourth Amendment, along with a state law negligence claim. After plaintiffs engaged in lengthy discovery, employed different lawyers, and changed key points of their position numerous times, the court considered defendants' motion for summary judgment. Ultimately, the court granted defendants' motion, finding that all the officers used force that was reasonable under the Fourth Amendment, and that even if the force used was excessive, they were entitled to qualified immunity. On appeal, plaintiffs challenge both the district court's rulings that the force used was reasonable and that defendants are entitled to qualified immunity for the use of any unreasonable force.

We review the district court's grant of summary judgment *de novo*. *See Distasio v. Perkin Elmer Corp.*, 157 F.3d 55, 61 (2d Cir. 1998). As the district court did, we must first consider whether plaintiffs have established a violation of the Fourth Amendment before we consider a qualified immunity defense. *See Saucier v. Katz*, 533 U.S. 194, 200 (2001). To determine the reasonableness of the force used, courts must balance the manner of the seizure – when and how it was made – against the police interests, *see Graham v. Connor*, 490 U.S. 386, 395-96 (1989), and must consider "the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *id.* at 396. At all times, the court must evaluate the situation "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* at 396.

Plaintiffs do not challenge the propriety of the use of force. Rather, they challenge only the *degree* of force used, contending that the use of *deadly* force was unreasonable. The only evidence plaintiffs offer in support of this conclusion is their expert's report, which offers the opinion that the shooting was not reasonable. This evidence may not be strong enough to survive summary judgment. Plaintiffs do not dispute that the officers were responding to a request for help from the mother of the suspect-victim, that they were aware that Alex had a violent nature and had recently attacked his mother, and that he actively resisted arrest and did not respond to less forceful attempts to control him. When Officer Tosto saw the gun and notified the other officers of its existence, Alex fired two shots at them. Under these

circumstances, it is not clear that Officer Parker acted unreasonably in shooting Alex.

Assuming, *arguendo*, that the officers used force that was sufficiently unreasonable under the Fourth Amendment to constitute excessive force, we find that the defendants are entitled to qualified immunity. "A qualified immunity defense is established if (a) the defendant's action did not violate clearly established law, or (b) it was objectively reasonable for the defendant to believe that his action did not violate such law." *Salim v. Proulx*, 93 F.3d 86, 89 (2d Cir. 1996). "The objective reasonableness test is met – and the defendant is entitled to immunity – if officers of reasonable competence could disagree on the legality of the defendant's actions." *Lennon v. Miller*, 66 F.3d 416, 420 (2d Cir. 1995) (internal quotations omitted). Plaintiffs again point to their expert report to argue that "[a] reasonable jury could believe and credit the testimony of the plaintiff's expert" that the shooting was not reasonable and that no reasonable officer would find the shooting reasonable. However, plaintiffs misunderstand the standard for granting summary judgment based on a qualified immunity defense. The disagreement among the experts does not establish a material factual dispute. The differing expert opinions evidence a legal dispute about the reasonableness of the officers' conduct. In fact, it lends credence to the conclusion that reasonable officers could differ in their opinion of the propriety of the force employed. "[I]f the court determines that the only conclusion a rational jury could reach is that reasonable officers would disagree about the legality of the defendants' conduct under the circumstances, summary judgment for the officers is appropriate." *Lennon*, 66 F.3d at 421. Because the evidence establishes that "'officers of reasonable

competence could disagree' on the legality of the defendant's actions," the objective reasonableness test is met, and defendants are entitled to qualified immunity. *Salim*, 93 F.3d at 91 (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). We affirm the grant of summary judgment on this ground.

We have considered the plaintiffs' remaining arguments and find them to be without merit.

Accordingly, the judgment of the district court is **AFFIRMED.**

FOR THE COURT:
ROSEANN B. MACKECHNIE,
Clerk
By:

/s/ Lucille Carr

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

WILLIAM G. GRADY, ADMINISTRATOR,	:	
Plaintiff,	:	
SHIRLEY JAKABOSKI,	:	
Intervenor-Plaintiff	:	CASE NO. 3:96CV00214 (RNC)
V.	:	
TOWN and CITY OF MIDDLETOWN, JAMES PARKER, LOUIS TOSTO, and JOHN LATERRA,	:	
Defendants.	:	

RULING AND ORDER

Plaintiff Grady brings this action in this capacity as administrator of the Estate of Alex Jakaboski against the City of Middletown and three Middletown police officers pursuant to 42 U.S.C. § 1983. Plaintiff claims that Officer Parker shot and killed Jakaboski in violation of the Fourth Amendment and that Officers Tosto and Laterra are liable for Parker's use of force because they had a reasonable opportunity to prevent it. Plaintiff also pleads state law claims of negligence against the officers and an indemnification claim against the City pursuant to Conn. Gen. Stat. § 7-465. The mother of the decedent, Shirley Jakaboski, has intervened to allege state law claims of negligence against the officers. Defendants have moved for summary judgment on the § 1983 claim contending that Officer Parker's use of deadly force was objectively reasonable under the

Fourth Amendment and that the officers are entitled to qualified immunity. I agree that the officers are entitled to summary judgment on the § 1983 claims and dismiss the pendent state law claims.[1]

I. Facts

The following facts are essentially undisputed. On November 27, 1994, Shirley Jakaboski called the Middletown Police Department from a friend's house to complain about her son's behavior. She reported that he had hit her, knocked over a bureau, and put a hole in the wall. *See* Middletown Police Tape Transcript, Ex. A to Defs.' Brief, Addendum at 2. She told the dispatcher that there was a BB gun and a bow in the house and a rifle she was planning to give her son as a gift. She made no mention of any handguns. *See id.* at 2-3. Mrs. Jakaboski stated that she wanted a police officer to tell her son not to hit his mother and to go to counseling. *See id.* at 3.

The defendant officers were dispatched to the Jakaboski condominium. Alex Jakaboski, a 17 year old male, opened the door but refused to allow the officers to enter. After some delay, Mrs. Jakaboski arrived and let the officers in. Six people were present: Mrs. Jakaboski, her friend Dori Beck, Alex, and the three officers. Mrs. Jakaboski told the officers about her problems with Alex but did not disclose that he might be armed with a handgun.

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[1] Plaintiffs' amended complaint alleges civil rights claims under § 1983 against "all defendants" but fails to include allegations adequate to state a § 1983 claim against the City. Accordingly, to the extent plaintiff has attempted to allege a § 1983 claim against the City, that claim is also dismissed.

The officers viewed the damage to the condominium, which tended to corroborate Mrs. Jakaboski's complaint, and decided to arrest Alex pursuant to Connecticut's Family Violence laws, which mandate an arrest in certain circumstances.[2]

Parker told Alex to put down a soda can he was holding. The officers then told him to turn around so they could handcuff him. Alex extended his arms, stiffened, resisted the officers' attempts to handcuff him, and began to struggle. According to Mrs. Beck, the officers had trouble restraining Alex. *See* Beck Dep., Ex. L to Defs.' Brief, at 97-98. Eventually, the officers brought Alex to the floor on his stomach with his arms and hands beneath him. Laterra handcuffed Alex's left wrist. The other officers tried but were unable to handcuff his right wrist because he refused to move his right arm, which remained beneath him.

The parties dispute what happened next. Defendants have testified that they began to roll Alex on his side so they could handcuff his right wrist. As they did so, Tosto realized Alex had a gun and yelled either "gun" or "46," the code word for weapon. They rolled Alex back onto his stomach as a protective measure and ordered him to release the gun but he refused. As the struggle continued, Alex's gun went off twice, both times at an upward angle. One bullet went through Parker's boot, although he was

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[2] Conn. Gen. Stat. § 46b-38b(a) provides: "Whenever a peace officer determines upon speedy information that a family violence crime . . . has been committed, . . . he shall arrest the person or persons suspected of its commission and charge such person or persons with the appropriate crime."

not aware of it at the time, and the other went through Alex's thigh. Both bullets lodged in nearby walls, and smoke from the gun came up between Parker and Laterra. Laterra jumped up to move away from Alex. According to Parker and Laterra, Alex was beginning to move forward as if to get up. *See* Parker's Statement, Ex. C to Defs.' Brief, at 5; Laterra Dep., Ex. I to Defs.' Brief, at 72.[3] Immediately after Alex's gun discharged, Parker fired two shots into the back of Alex's head, killing him. When Alex's body was turned over, he was found to be wearing a shoulder holster under his jacket and holding a Norinco .45 caliber handgun in his right hand.[4] Three magazines of bullets were found in his back pocket, each containing seven .45 caliber rounds.

Plaintiffs concede that Alex struggled with the officers on the floor, that a handgun was found under his body, and that the gun discharged twice as a result of the struggle. However, they contend that Parker fired first and that Alex's gun discharged reflexively after he was shot. Plaintiffs also contend that Alex was so firmly pinned by the officers before he was shot that no reasonable officer could have believed that deadly force was necessary to prevent him from shooting others in the room.

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[3] This point is disputed by plaintiffs, who note that the State Police Forensic Laboratory Report states that "[the] bloodstain pattern would indicate that Mr. Jakaboski's head was very near to, if not in contact with the floor when at least one of the projectiles impacted the back of his head." State Police Forensic Laboratory Report, Ex. 7 to Pls.' First Statement of Material Facts, at 2.

[4] The handgun was owned by Mrs. Jakaboski.

II. Discussion

Under Fed. R. Civ. P. 56(c), summary judgment is proper if there is no genuine issue of material fact for a jury to resolve and the moving party is entitled to judgment as a matter of law. A factual dispute is material if it bears on an essential element of the plaintiff's claim; a factual dispute is genuine if a reasonable jury could resolve it in favor of the plaintiff. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-51 (1986).

On a motion for summary judgment, "the judge's function is not to himself weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Id.* at 249. In making this determination, the evidence must be viewed fully and in a manner most favorable to the nonmoving party, giving it the benefit of all reasonable inferences and resolving all doubts in its favor.

In opposing summary judgment, a party "must do more than simply show that there is some metaphysical doubt as to material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). Rather, it must "offer some hard evidence showing that its version of the events is not wholly fanciful." *D'Amico v. City of New York*, 132 F.3d 145, 149 (2d Cir. 1998). The evidence must be sufficient to enable "a rational trier of fact to find for the non-moving party." *Matsushita Electric Indus. Co.*, 475 U.S. at 587. "[C]onclusory allegations, conjectur, and speculation . . . are insufficient to create a genuine issue of fact." *Kerzer v. Kingly Mfg.*, 156 F.3d 396, 400 (2d Cir.

1998), *see also Podell v. Citicorp Diners Club*, 112 F.3d 98, 100 (2d Cir. 1997).[5]

Excessive Force Claim Against Officer Parker

The excessive force claim against officer Parker is governed by the Fourth Amendment's standard of objective reasonableness. *See Graham v. Connor*, 490 U.S. 386, 397 (1989).[6] A police officer's use of deadly force is reasonable only when "the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." *Tennessee v. Garner*, 471 U.S. 1, 3 (1985).[7] The reasonableness of a use of force must be examined from "the perspective of a

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[5] At one time, summary judgment was denied even though a plaintiff's story was "improbable," *see Arnstein v. Porter*, 154 F.2d 464, 469 (2d Cir. 1946), but that approach has been abandoned. *See Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1258 n.4 (2d Cir. 1986); *Heyman v. Commerce & Indus. Ins. Co.*, 524 F.2d 1317, 1319 (2d Cir. 1975); *Beal v. Lindsay*, 468 F.2d 287, 291 (2d Cir. 1972).

[6] "Reasonableness under the Fourth Amendment resembles tort law in its attention to how a specific, concrete circumstance should affect an officer's judgment [and] [t]his heightened sensitivity to context suggests that reasonableness under the Fourth Amendment should frequently remain a question for the jury." *Abraham v. Raso*, 183 F.3d 279, 289-90 (3rd Cir. 1999). However, "even though reasonableness traditionally is a question of fact for the jury, defendants can still win on summary judgment if the district court concludes, after resolving all factual disputes in favor of the plaintiff, that the officer's use of force was objectively reasonable under the circumstances." *Scott v. Heinrich*, 39 F.3d 912, 915 (9th Cir. 1994) (internal citations omitted).

[7] Conn. Gen. Stat. § 53a-22(c), while not determinative of the Fourth Amendment issue, provides that a police officer "is justified in using deadly physical force upon another person . . . only when he reasonably believes such to be necessary to: (1) Defend himself or a third person from the use or imminent use of deadly physical force. . . ."

reasonable officer on the scene, rather than with the 20/20 vision of hindsight," *Graham*, 490 U.S. at 396, taking into account all the relevant facts and circumstances, including "the severity of the crime at issue, whether the suspect pose[d] an immediate threat to the safety of the officers or others, and whether he [was] actively resisting arrest or attempting to evade arrest by flight." *Id.* at at 396.[8]

Defendants contend that at the moment Officer Parker fired his weapon, Alex was resisting arrest and refusing to give up a gun that had just discharged twice. On their version, Officer Parker shot Alex in order to prevent serious injury or death to others in the room. If their account of the events is accurate, Alex did pose an immediate danger and no reasonable juror could find that Officer Parker's decision to use deadly force was unlawful. Accordingly, the issue is whether there is a genuine dispute that Alex posed an immediate danger as claimed by the officers.

Plaintiffs contend that a jury could hold Officer Parker liable for excessive force on the ground that Alex's gun did not discharge until after he had been shot by Officer Parker. Defendants do not accept the premise that it is objectively unreasonable to use deadly force in a situation like this unless and until the individual engaged in life threatening behavior actually fires his gun.

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[8] Under the Fourth Amendment, the reasonableness of the officers' actions leading to Officer Parker's use of deadly force is not in issue. *See Salim*, 93 F.3d at 92. Thus, the only relevant question under the Fourth Amendment is whether, at the moment Officer Parker fired his weapon, he had reason to perceive that he and the others in the room were in imminent danger.

However, even assuming that the officers were not entitled to use deadly force until Alex's gun discharged, the record establishes that Alex's gun discharged before he was shot. Plaintiffs have formally admitted that "[o]ne-half to one second lapsed between the time Mr. Jakaboski's gun discharged and defendant, Parker, shot Mr. Jakaboski twice." Joint Pls.' Statement of Material Facts Which Are Not In Dispute, ¶ 11. [Doc. #46, at 9]. They now take a position at odds with that admission. However, the evidentiary support for it remains overwhelming.[9]

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[9] In addition to the officers' testimony and the physical evidence gathered by the State in its investigation of the shooting, the record contains the following statements by Mrs. Jakoboski [sic] and Mrs. Beck:

> "While struggling to pull his right hand out, I heard a gun discharge. Not more than two seconds later, Officer Parker fired two shots into the back of my son's head from a distance of not more than six inches." Shirley Jakaboski Media Statement, Ex. B to Defs.' Supp. Brief, at 3.
>
> "One of the officers was holding a gun a short distance from the back of Alex's head before I heard a shot go off. I saw Alex's face as his eyes widened, then I heard and saw the officer's gun go off shooting Alex in the back of the head twice." Shirley Jakaboski Statement, Ex. B to Defs.' Supp. Brief, at 7.
>
> "The next thing I heard was a shot. A brief pause and then two more shots." Beck Statement, Ex. C to Defs.' Supp. Brief, at 3.
>
> "It seems to me that after the first shot I looked, turned toward him (Alex). I think I saw the policeman shoot him (Alex) twice, it feels that the policeman's shots were toward the head." Addendum to Beck Statement, Ex. B to Defs.' Supp. Brief.
>
> "Q: You heard a loud noise, did you know where that loud noise came from?

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Plaintiffs also contend that a jury could find in their favor on the ground that Alex was so firmly pinned to the floor that he could not shoot anyone but himself. As defendants point out, plaintiff's position on this issue is refuted by physical evidence. *See* Defs.' Mem. In Supp. of Supplemental Not. For Summ. J. at 3-6 [doc. #57]. It is undisputed that of the two bullets discharged from Alex's weapon while he was on the floor, pinned by the officers, one lodged in a wall at three feet, ten inches from the floor (chest height), *see* State Police Forensic Laboratory Report, Ex. B to Defs.' Brief, at 18, and one went through Parker's boot. *See id.* at 12-13; Report of Chief State's Attorney, Ex. A to Defs.' Brief, at 33, 35. Given this evidence, no reasonable juror could find that Alex's position on the floor prevented him from shooting others.[10]

A: I looked back and it looked like it was coming from where they were. It sounded like –

Q: You didn't know where it came from, correct?

A: No.

Q: What happened when you looked back?

A: The officer was shooting Alex.

Q: Well, did you see him draw his gun?

A: No.

Q: What did you see?

A: The gun is by Alex's head and bang bang. I couldn't believe it."

Beck Dep., Ex. 10 to Pls.' First Statement of Material Facts, at 50.

[10] Plaintiffs emphasize that Officer Parker did not know where the bullets went until after he shot Alex. Assuming that to be true, his inability to know where the bullets went did not make it objectively unreasonable for him to believe that Alex posed an immediate danger.

In cases arising from fatal police shootings, the circumstantial evidence must be scrutinized to see if it is consistent or inconsistent with the officers' account. Here, the circumstantial evidence supports the officers' version.[11]

Excessive Force Claim Against Defendants Tosto and Laterra

The amended complaint alleges that Officers Tosto and Laterra inflicted deadly force on Alex but there is no evidence to that effect. Plaintiffs also allege that Officers Tosto and Laterra should have intervened to prevent Officer Parker from shooting Alex. However, the force used by Officer Parker was not unlawful. Accordingly, Officers Tosto and Laterra are entitled to summary judgment on the excessive force claims against them.

Qualified Immunity

Defendants contend that even if Officer Parker's use of force could be determined to be unlawful, they are nevertheless entitled to qualified immunity, which shields government officials from liability for damages as a result

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[11] *See* Report of Chief State's Attorney, Ex. A to Decl.' Mem. In support of Summ. J. at 33 [doc. #35] ("Defs.' Mem."). The State Police Forensic Science Laboratory concluded that, "[b]ased on the study of the crime scene photographs and the physical evidence, the shooting scene is consistent with the statements and descriptions of the Middletown police officers." State Police Forensic Laboratory Report, Ex. B to Defs.' Mem. at 20. Both the Chief's State's Attorney's and the Middletown Police Department Firearms Review Board found that Officer Parker's use of force were [sic] justified. *See* Report of the Chief State's Attorney, Ex. A to Defs.' Mem. at 51; Report of Middletown Police Department Firearms Review Board, Ex. H to Defs.' Mem.

of the performance of discretionary duties. *See Harlow v. Fitzgerald*, 457 U.S. 817-18 (1982). I agree.

"A qualified immunity defense is established if (a) the defendants' action did not violate clearly established law, or (b) it was objectively reasonable for the defendant to believe that his action did not violate the law." *Salim*, 93 F.3d at 89. "In this instance, the question for the purposes of qualified immunity is whether a reasonable officer could have believed that the use of force alleged was objectively reasonable in light of the circumstances." *Lennon v. Miller*, 66 F.3d 416, 425 (2d Cir. 1995). This test is satisfied if "officers of reasonable competence could disagree on the legality of the defendants' actions." *See Salim*, 93 F.3d at 91 (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). "Thus, if the court determines that the only conclusion a rational jury could reach is that reasonable officers would disagree about the legality of the defendants' conduct under the circumstances, summary judgment for the officers is appropriate." *Lennon*, 66 F.3d at 421.

Qualified immunity serves to protect police from liability and suit when they are required to make on-the-spot judgments in tense circumstances. In this case, the record establishes as a matter of law that Officer Parker used deadly force after Alex's gun discharged in close proximity to the officers. No rational jury could find that his decision to use deadly force was "so flawed that no reasonable officer would have made the same choice." *Lennon*, 66 F.3d at 425.[12] Accordingly, the defendants are

[12] "No court or jury in a reported case has found fault with an officer's use of deadly force to defend himself or another person from an imminent threat with a deadly weapon." William A. Geller and Michael

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entitled to summary judgment based on qualified immunity.

III. Conclusion

For the forgoing reasons, defendants' motion for summary judgment is granted. Because the federal claims have been dismissed, the pendent state law claims must also be dismissed. *See Salim,* 93 F.3d at 92.

So ordered.

Dated at Hartford, Connecticut this 29th day of March 2001.

/s/ Robert N. Chatigny
Robert N. Chatigny
United States
District Judge

Scott, *Deadly Force: What We Know,* Washington, D.C., Police Exec. Res. Forum, 1992.